No. 82-1128

In the Supreme Court of the United States

OCTOBER TERM, 1982

IVAN PAVKOVIC, DIRECTOR,
ILLINOIS DEPARTMENT OF MENTAL HEALTH
AND DEVELOPMENTAL DISABILITIES, PETITIONER

v.

ROBERT TIDWELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

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1. In 1976, respondents, a class of mental patients, obtained a judgment in the United States District Court for the Northern District of Illinois invalidating certain state and federal procedures used to distribute Social Security disability benefits for individuals confined to state mental institutions in Illinois (Pet. App. A-1 to A-18).[1] Both the

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[1]The district court subsequently described its holding as follows (Pet. App. C-2):

> On June 23, 1976, we ruled on cross motions for summary judgment, indicating in a declaratory judgment against the federal defendants that procedures employed by them in their appointment of representative payees pursuant to 42 U.S.C. §405(j) and 20 C.F.R. §404.1601-1610 violated due process. We, however, found no constitutional or statutory authority which would prohibit any appointment of representative payees and thus denied

state government and the federal government subsequently altered their procedures concerning mental patients' Social Security disability benefits (*id.* at C-3 to C-8). The federal defendants then moved to alter or amend the district court's judgment under Fed. R. Civ. P. 59(e) (Pet. App. C-2). The district court held that the new federal procedures satisfied its original judgment and approved the new state procedures as well (*id.* at C-7 to C-8).

Respondents then sought attorneys' fees from petitioner (the Director of the Illinois Department of Mental Health) and from the federal defendants (Pet. 13-14). In early 1981 the district court assessed attorneys' fees against petitioner under 42 U.S.C. 1988, but refused to assess fees against the federal defendants for lack of statutory authorization (Pet. App. D-2). Respondents did not challenge the district court's dismissal of their request for fees against the federal government; instead, they "voluntarily agreed to reduce their request for fees by an amount which represents all time spent solely on matters involving the federal defendant[s]" (*id.* at D-5; footnote omitted). Petitioner, but not the federal defendants or respondents, then appealed both the merits of the district court's judgment and the attorneys' fee award.

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plaintiffs' request for injunctive relief against any such appointments by federal defendants.

With respect to the state defendants, we found that the Illinois procedure of having legally competent patients assign their rights to future Social Security disability benefits for payment of institutional charge[s] pursuant to *Ill. Rev. Stat.* ch. 91½, §12-12, and Department of Mental Health Rule 10.02 and Form 623 was in conflict with the prohibition against such assignments found in 42 U.S.C. §407. Accordingly, we entered a declaratory judgment against the use of those procedures to seize Social Security funds.

While petitioner's appeal was pending, the Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, 94 Stat. 2325 *et seq.*, took effect. That Act expanded the United States' liability for attorneys' fees in certain respects. Petitioner called the new Act to the court of appeals' attention, both in a letter to the court under Rule 11 of the Rules of the Seventh Circuit and in a subsequent rehearing petition (Pet. 15, 24), and urged that it be used as the basis for apportioning the fee award between the state and federal defendants.

The court of appeals affirmed the district court's judgment against petitioner on the merits (Pet. App. F-8 to F-11). Without referring to the EAJA, the court also affirmed the attorneys' fee award against petitioner, except that it reversed the district court's imposition of a 1.5 multiplier on top of the base fee award (Pet. App. F-11 to F-15).

2. In this Court, petitioner argues that the "[f]ederal defendants are liable for attorneys' fees under the 'Equal Access to Justice Act' " (Pet. 24) and that the EAJA should be used to apportion the attorneys' fee award "among the defendants based on their respective culpability" (*ibid.*).[2] For a number of reasons, these issues do not merit review in this case. First, petitioner completely disregards the fact that the apportionment he seeks has already been made. As earlier noted, respondents voluntarily deducted from their fee request all time spent solely on matters involving the federal defendants (Pet. App. D-5). And, as to the remainder of the time claimed by respondents, the district court made the following finding (*id.* at D-5 n.2; emphasis added):

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[2]The first and second questions presented by the petition (Pet. i) relate to respondents' standing to seek relief against petitioner and the merits of the lower courts' decisions against petitioner. Because these issues do not affect the federal respondents, we do not discuss them.

> It should be noted that the majority of time spent in litigating this case was devoted to claims which involved both state and federal defendants *and that this time would not have been less had only the state been sued.*

This finding was not disturbed by the court of appeals, and petitioner does not challenge it here. Thus, any further apportionment is unwarranted by the facts of this case.

Second, only respondents can be characterized as "prevailing parties" in this litigation, and thus only they would arguably be entitled to invoke the EAJA. They have never done so, however, nor did they appeal the district court's pre-EAJA denial of fees against the federal defendants. There is no basis for allowing petitioner, who in no sense prevailed against his co-defendants, to claim relief under the EAJA. Thus, the court of appeals quite properly disregarded petitioner's arguments under that statute.

Finally, petitioner's overly-simplistic assertion (Pet. 24) that the EAJA applies to this litigation because the appeal was pending on the effective date of the Act ignores the facts of this case. The only matter pending on October 1, 1981, the effective date of the EAJA, was *petitioner's* appeal, in which the federal defendants did not participate.[3] The federal government's participation in the merits of this case terminated on March 5, 1979, when the district court granted the government's motion to amend the judgment (Pet. App. C-11). And the government's participation in the

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[3]Petitioner asserts that the "Federal defendants submitted a brief to the Seventh Circuit on the applicability of the [EAJA]" (Pet. 24). That is not true. The government merely filed motions to strike petitioner's letter and rehearing petition insofar as they raised the EAJA because no question concerning the government's liability for fees was pending before the court of appeals. The court of appeals apparently agreed because, as noted, it did not discuss the EAJA.

attorneys' fee litigation ended on March 17, 1980, when the district court denied respondents' application for fees against the federal defendants (C.A. App. M-2 [4])—a decision that respondents did not appeal. In short, this case was not "pending" against the federal defendants on the EAJA's effective date. See *Commissioners of Highways* v. *United States*, 684 F.2d 443, 444-445 (7th Cir. 1982).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied insofar as it seeks review of the court of appeals' decision respecting attorneys' fees.

REX E. LEE
Solicitor General

FEBRUARY 1983

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[4]"C.A. App." denotes the Appendix filed in the court of appeals.

[5]Moreover, there is a substantial question whether sovereign immunity bars the assessment of attorneys' fees in pending cases for legal work performed prior to the EAJA's effective date. Compare, *e.g.*, *Tyler Business Services, Inc.* v. *NLRB*, 695 F.2d 73 (4th Cir. 1982), petition for rehearing pending (allowing retroactive payments), with *Allen* v. *United States*, 547 F. Supp. 357 (N.D. Ill. 1982) (denying retroactive payments). The petition does not face this problem, and it would be inappropriate for the Court to resolve the question in a case in which the unique factual and procedural background of the controversy deprives it of any broad significance.